Supreme Court, U.S.
FILED
NOV 19 1991
OFFICE OF THE CLERK

No. 91-542

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,
Petitioners,

v.

FRANK ROBERT WEST, Jr.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER MR. WEST'S UNEXPLAINED POSSESSION OF A PORTION OF THE HOUSEHOLD GOODS STOLEN FROM A CABIN IN ANOTHER COUNTY OF VIRGINIA SOME TWO TO FOUR WEEKS EARLIER IS CONSTITUTIONALLY SUFFICIENT EVIDENCE UNDER JACKSON v. VIRGINIA TO CONVINCE ANY RATIONAL JUROR BEYOND A REASONABLE DOUBT THAT MR. WEST, HIMSELF, COMMITTED THE LARCENY?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE..... 1

REASONS WHY THE PETITION SHOULD BE DENIED.....5

1. THE DECISION REACHED BELOW COMPORTS WITH THIS COURT'S STANDARDS FOR ANALYZING THE SUFFICIENCY OF THE EVIDENCE IN CASES WHERE A STATE RELIES UPON A PERMISSIVE INFERENCE TO PROVE GUILT BEYOND A REASONABLE DOUBT.....6

2. THE DECISION BELOW DID NOT DISTURB THE JURY'S FINDINGS REGARDING WEST'S TESTIMONY.....12

3. THE DECISION BELOW IS A FACT-BOUND DETERMINATION WHICH HAS NO BROADER IMPLICATIONS THAT REQUIRE PLENARY CONSIDERATION BY THIS COURT.....13

4. THE DECISION BELOW DOES NOT IMPLICATE TEAGUE V. LANE BECAUSE IT WAS "COMPELLED" BY PRECEDENT AND IT IMPOSES NO "NEW" OBLIGATION ON THE COMMONWEALTH OF VIRGINIA.....17

5. THE PETITION FAILS TO IDENTIFY ANY COMPELLING REASON FOR GRANTING CERTIORARI.....20

CONCLUSION.....22

TABLE OF AUTHORITIES

CASES

Anderson v. Fuller, 455 U.S. 1028 (1982).....21

Barfield v. United States, 229 F.2d 936 (5th Cir. 1956).....16

Barnes v. United States, 412 U.S. 837 (1973).....9

Bell v. Wolfish, 441 U.S. 520 (1979).....12

Berryman v. Moore, 619 F. Supp. 853 (E.D. Va. 1985), appeal dismissed, 792 F.2d 139 (4th Cir. 1986).....16

Butler v. McKeller, 110 S. Ct. 1212 (1990) 18

Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982).....passim

Dunlop v. United States, 165 U.S. 486 (1897).....9

Jackson v. Virginia, 443 U.S. 307 (1979).....passim

Knetsch v. United States, 364 U.S. 361 (1960).....12

Leary v. United States, 395 U.S. 6 (1969).....8

McNamara v. Henkel, 226 U.S. 520 (1913).....9

Morton v. Commonwealth, 408 S.E.2d 583 (Va. Ct. App. 1991).....19, 20, 21

Saffles v. Parks, 110 S. Ct. 1257 (1990).....18

Sawyer v. Smith, 110 S. Ct. 2822 (1990).....18

State v. Heath, 492 P.2d 978 (Utah 1972).....16

Swift v. Lynn, 870 F.2d 1039 (5th Cir. 1989).....15

Teague v. Lane, 489 U.S. 288 (1989).....passim

Torres v. United States, 270 F.2d 252 (9th Cir. 1959), cert. denied, 362 U.S. 921 (1960).....16

Tot v. United States, 319 U.S. 463 (1943).....7

Ulster County Court v. Allen, 442 U.S. 140 (1979).....passim

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981).....12

United States v. Bamberger, 456 F.2d 1119 (3rd Cir. 1972), cert. denied, 413 U.S. 919 (1973).....15

United States v. Eley, 723 F.2d 1522 (11th Cir. 1984).....13

United States v. Gainey, 380 U.S. 63 (1965).....7, 8, 9

United States v. Jones, 418 F.2d 818 (8th Cir. 1969).....15

Wilson v. United States, 162 U.S. 613 (1896).....9

STATUTES AND RULES

28 U.S.C. § 2254 .....4, 6, 21

Va. Code Ann. § 18.2-95 (Repl. Vol. 1975).....1

Va. Code Ann. § 18.2-95 (Repl. Vol. 1988).....1

Sup. Ct. R. 10(a) (1990).....20

OTHER AUTHORITIES

Annotation, What Constitutes "Recently" Stolen Property Within Rule Inferring Guilt from Unexplained Possession of Such Property, 89 A.L.R.3d 1202 (1979).....14

STATEMENT OF THE CASE

Respondent, Frank West, pleaded not guilty to the charge of feloniously taking, stealing, and carrying away the property of Angelo F. Cardova with a value of $100.00 or more in violation of Va. Code Ann. § 18.2-95 (Repl. Vol. 1975). J.A. 120a.[1] The testimony presented at trial indicated that Cardova, a resident of Falls Church, Virginia, owned a house in the Cabin Point subdivision of Westmoreland County, Virginia. J.A. 133a. On the afternoon of December 13, 1978, Cardova locked and left the cabin. He did not return until December 26, 1978. J.A. 134a. When Cardova entered the cabin on that date, he discovered that some of his property was missing and he notified the sheriff's office. Id. The value of the property taken from the Cardova cabin was $3,500.00. J.A. 135a.

On or about January 22, 1979, Cardova was asked by Sheriff C. W. Jackson of Westmoreland County to view various articles that the police had recovered. Id. He identified the following items as having been taken from his cabin: two television sets; a bar; some groceries; a sleeping bag; a mirror from the Philippines; a coffee table; a hardwood carving in the shape of a

[1] The relevant portion of the Virginia larceny statute provides as follows:

> Any person who ... [c]ommits simple larceny not from the person of another of goods and chattel of the value of $200 or more, shall be deemed guilty of grand larceny....

Va. Code Ann. § 18.2-95(2) (Repl. Vol. 1988). At the time of West's conviction, the statutory goods and chattel value threshold was $100.00.

ball and other wood carvings; a pair of shoes; a fur coat, valued at $35.00, with the name "Esther" embroidered in the lining; a box containing flatware; a lobster that had been caught in the China Sea and mounted on a basket; a silk jacket decorated with the legend "Korea 1970"; and a record player. J.A. 135a-141a. The value of the items recovered was $1,100.00. J.A. 142a. Several of the items that Cardova identified as his property were seized by the police on January 10, 1979, from West's residence in Gloucester County, Virginia. J.A. 145a-148a. West had previously shared this house with his wife, Carol Nadine West. At the time of the search, Mrs. West also had a residence in Richmond, Virginia, and spent only a portion of her time in the Gloucester County house. J.A. 158a-159a. West was not present at the time of the search. J.A. 149a.

Testimony from West's sister, Alice Shiflett, the owner of the house in which West resided, and from Peggy Jones, West's neighbor, established that West had exclusive possession of the house when the Cardova goods were recovered. J.A. 156a-165a. The only other testimony presented before the Commonwealth rested its case established the chain of custody for the Cardova property after it was seized by the police. J.A. 145a-156a.

At the close of the Commonwealth's case, West unsuccessfully moved to "strike the evidence" for failure to prove that he was the "active agent" in the theft. J.A. 166a. He then testified that he had purchased some of the items found by the police in his house from several different vendors at various

flea markets. J.A. 169a-170a. West indicated that he bought merchandise at flea markets and then resold the items at different locations. J.A. 170a. He specifically recalled purchasing several of the articles in question, including, but not limited to, the shell mirror and the mounted lobster, from Ronnie Elkins, who sold goods at flea markets. J.A. 171a-175a. West remembered that sometime before January 1, 1979, he gave $500.00 to Elkins for all the items he purchased. J.A. 173a, 175a. West explained that he was not able to produce Elkins as a witness because he did not know until the day of the trial what items he was charged with taking. J.A. 178a-179a.

The Commonwealth presented no rebuttal evidence. West then renewed the motion to strike, which was denied. J.A. 180a. In closing argument, the defense's theory of the case was that the Commonwealth presented "no direct evidence whatsoever that [West] carried, himself, items out of the [Cardova] house." J.A. 195a. The Commonwealth, in its closing argument, relied on the common law inference that the possessor of stolen property is the thief and asked the jury to reject West's claim that he was an innocent possessor of the property. J.A. 183a-191a. In pertinent part, the judge instructed the jury as follows:

> If you believe from the evidence beyond a reasonable doubt that property of a value of $100.00 or more was stolen from Angelo F. Cardova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

J.A. 215a.

The jury found the defendant guilty and sentenced him to ten years imprisonment. J.A. 202a-203a.

The sufficiency of the evidence to convict West beyond a reasonable doubt was unsuccessfully raised in the Virginia courts. See Pet. App. 5. West then unsuccessfully raised the sufficiency claim in a petition filed in district court pursuant to 28 U.S.C. § 2254.

On appeal, the Fourth Circuit reversed. The court first rejected threshold claims that the sufficiency issue was not exhausted in state court and that relief was, in any event, barred under the "new rule" restriction of Teague v. Lane, 489 U.S. 288 (1989). Regarding Teague, the court below rejected the Commonwealth's claim that West was asking for a "new rule" that Virginia's permissive inference was facially unconstitutional. Pet. App. 10. The court recognized that the basis for West's sufficiency claim was "simply that allowing the inference to be drawn by the jury on the facts of this case violated the proof-beyond-a-reasonable-doubt test of Jackson v. Virginia." Id. Teague was therefore inapplicable because "[o]bviously, a federal habeas court cannot be said to apply a 'new constitutional rule' whenever it applies the Jackson v. Virginia test to a 'new' set of facts in evidence." Id.

Regarding exhaustion, the court again noted that West was only raising a sufficiency issue on appeal, not a facial attack

on the inference. That sufficiency issue was exhausted because West had raised it at several different stages of the state court proceedings, both at trial, on appeal, and in state habeas proceedings. Pet. App. 8.[2]

The court then reached the merits and held that the evidence was not sufficient to convict for purposes of Jackson v. Virginia, 443 U.S. 307 (1979). The mere fact that West possessed some of the goods taken in the earlier burglary and the possession was "unexplained" could not persuade any rational juror that West was guilty beyond a reasonable doubt of committing the theft. Pet. App. 20.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner's attempts to cast the case in a "cert. worthy" light notwithstanding, there is nothing in the decision below which requires this Court's attention. There is no modification of Jackson v. Virginia, no "evisceration," as Petitioner

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[2] The Commonwealth conceded in district court pleadings that the Jackson claim was exhausted:

> Although the petitioner's claim concerning sufficiency of the evidence is cognizable and may be considered on the merits by this Court, he is not entitled to federal habeas corpus relief unless this Court finds that upon the record and evidence adduced at trial, 'no rational trier of fact could have found proof of guilt beyond a reasonable doubt.' See Jackson v. Virginia, 443 U.S. 307, 324 (1979).

J.A. 29a-30a. The Commonwealth urged the court to dismiss on this claim because "West was in possession of the recently stolen goods, and under Virginia law was guilty of larceny" and "[a] rational finder of fact could have found that West stole the property belonging to the Cardovas." J.A. 30a-31a.

contends, of Virginia's common law inference of theft, nor any announcement of a new rule of law in violation of Teague v. Lane. The court below did what it was constitutionally compelled to do under rulings of this Court already pronounced at the time the case was litigated in Virginia. Its determination that the evidence was insufficient to support West's conviction of theft breaks no new ground and raises no legal issue of national, or even local, concern.

1. The decision reached below comports with this Court's standards for analyzing the sufficiency of the evidence in cases where a state relies upon a permissive inference to prove guilt beyond a reasonable doubt.

The court below correctly applied the test enunciated in Jackson v. Virginia for review of sufficiency-of-the-evidence claims raised in 28 U.S.C. § 2254 proceedings. After assessing the evidence "in its entirety and in the light most favorable to the prosecution," the court concluded that no rational juror could find that West broke into the Cardova cabin and stole three thousand dollars' worth of household items simply because he was found to possess, without explanation, some of the stolen goods several weeks later.[3] Pet. App. 20.

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[3] To understand the narrowness of the ruling below, it is important to distinguish between two very different inferences arising from the unexplained possession of recently stolen property: the inference that the possessor actually stole the property in question and the inference that the possessor received the property with knowledge that it was stolen. Only the former is implicated here, since West was charged with actual theft of the Cardova property, not with the lesser offense of receiving stolen goods. The inference of theft from the basic fact of possession is a much weaker inference than that of guilty knowledge: the latter is "more widely accepted without qualification or corroborating evidence [than the inference of theft]"

This holding is fully consistent with the Court's decisions concerning the use and probative force of permissive inferences to prove guilt. In United States v. Gainey, 380 U.S. 63 (1965), the Court upheld against a due process challenge an instruction which authorized the jury to infer from defendant's unexplained presence at an illegal still that he was "carrying on the business of a distiller or rectifier without having given bond as required by law." The Court noted, however, the distinction between finding that the use of an inference is constitutionally permissible[4] and finding that the evidence giving rise to the inference is necessarily sufficient to support a conviction in a particular case. Id. at 68. A conviction which is based on the bare facts giving rise to a properly drawn permissive inference remains subject to challenge on sufficiency grounds. Thus, notwithstanding the permissive inference, the trial judge is free to direct a verdict or to grant judgement n.o.v., and the court of appeals may review the trial judge's denials of such motions. Id.

In Ulster County Court v. Allen, 442 U.S. 140 (1979), a habeas corpus case, the Court again held that the use of a common law or statutory permissive inference generally comports with due

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for the simple reason that "the inference of mere knowledge is a much more likely one." Cosby v. Jones, 682 F.2d 1373, 1381 (11th Cir. 1982).

[4] The Court found that the statutory permissive inference met the rationality test of Tot v. United States, 319 U.S. 463 (1943), requiring a rational connection between the facts proved and the ultimate fact presumed. Gainey 380 U.S. at 66-68.

process if it satisfies the more-likely-than-not rationality test of Leary v. United States, 395 U.S. 6 (1969)--that is, if there is a rational connection between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former. Ulster County Court, 442 U.S. at 165-67. The Court explained that the "more likely than not" test is appropriate for assessing the constitutionality of allowing the jury to draw the permissive inference because the inference is just "one not necessarily sufficient part of [the prosecution's] proof" and the "prosecution may rely on all of the evidence in the record to meet the reasonable-doubt standard." Id. at 166-7 (emphasis added). "As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in Leary." Id. at 167 (emphasis added). As in Gainey, the Court recognized the distinction between the standard for allowing the use of a permissive inference and the independent question of whether the evidence, including the inference, in a particular case establishes proof of guilt beyond a reasonable doubt:

> The permissive presumption, as used in this case, satisfied the Leary test. And, as already noted, the New York Court of Appeals has concluded that the record as a whole was sufficient to establish guilt beyond a reasonable doubt.

Id.

Finally, in Jackson v. Virginia, 443 U.S. 307, decided just three weeks after Ulster, the Court held that sufficiency-of-the-

evidence challenges were cognizable as due process claims in habeas proceedings. When such a claim is raised, the habeas court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. The petitioner in such cases "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 324.[5]

Thus, the law in effect at the time this case was litigated--and as it stands today--is clear: (1) a permissive inference is not, in itself, conclusive proof of guilt but must

[5] In addition to Gainey, Ulster, and Jackson, the Court has had occasion to pass on a number of implications flowing from the use of inferences in connection with a defendant's unexplained possession of recently stolen property. See Barnes v. United States, 412 U.S. 837, 845-46 (1973) (instruction allowing inference from defendant's unexplained possession of recently stolen Treasury checks that defendant knew the checks to be stolen comports with due process); McNamara v. Henkel, 226 U.S. 520, 524-25 (1913) (finding evidence that defendant was found trying to crank stolen car, with disarranged ignition wiring, within a few hours of, and 40 feet from the place of burglary tended to show defendant's guilty participation in the burglary during which the car was stolen); Dunlop v. United States, 165 U.S. 486, 502 (1897) (holding that an instruction which allowed the jury to presume that items delivered to a mail box by mailmen were in fact mailed was not inconsistent with the presumption of innocence and the court need not instruct on the relative weight of the two presumptions; in dictum, noting the inference of theft from the possession of stolen goods as one of many examples where a presumption is not inconsistent with, or overridden by, the presumption of innocence); Wilson v. United States, 162 U.S. 613, 620-21 (1896) (defendant's possession of murder victim's property two weeks after murder was committed supported inference that defendant committed murder and jury could consider inference along with other evidence presented to determine guilt).

be considered along with all other evidence in determining whether there is proof of guilt beyond a reasonable doubt; and (2) a federal court, in evaluating a sufficiency claim on collateral review, has a duty to conduct an independent review of the evidence to determine whether any rational juror could have found proof of each element of the crime beyond a reasonable doubt.

Equally clear is the lower court's compliance with these rules. The court found as follows: that the "Commonwealth ... relied exclusively on Virginia's common law permissive inference that one in the unexplained possession of recently stolen goods is himself the thief" (Pet. App. 4); "the only evidence of guilt consist[ed] of the 'basic facts' of the inference" (Id. at 7); "[t]here was nothing ... that added any further probative force to those bare facts" (Id. at 14); an independent review of the evidence revealed that the "inferential force of the ... evidence used to invoke the inference" (Id. at 15) in this case was weak[6] where "th[e] theft was not so recent that a purchase in the interval could not have been likely" (Id. at 16), "the items found in West's possession made up only a third in value of those stolen from Cardova" (Id.), the items were not concealed (Id. at 17), "[West's] proffered explanation [was not so totally incredible as to] be treated as positive evidence of guilt" (Id.

[6] The analytical framework used by the court below in assessing the inferential force of the evidence was one that was also used in Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982), the first and among the very few federal circuit decisions having need to apply Jackson v. Virginia in a case where the common law inference of theft served as the only evidence of guilt.

at 19), and there was no evidence "that tended to 'corroborate' the inference" (Id. at 20); and finally, as a result of the foregoing, the evidence in this case, "assessed in its entirety and in the light most favorable to the prosecution, was not sufficient to persuade any rational trier of fact of [West's] guilt [of theft]." (Id.). Thus, the court found it irrational to conclude beyond a reasonable doubt that West participated in the burglary and theft of household items from the Cardova cabin simply because he was found to possess some of the items taken in the theft several weeks later in a different county of Virginia.

Petitioner protests, however, that the result in this case must be incorrect since "West's sufficiency claim was rejected by the state trial judge, all seven members of the Virginia Supreme Court, and a federal district court." Pet. 10. While these rulings certainly gave the panel pause, Pet. App. 20, they have no special significance as a matter of law. This Court does not permit a federal habeas court to defer to a state court's ultimate findings that the evidence is constitutionally sufficient; instead, the federal habeas court must make an independent evaluation of the sufficiency of the evidence. Jackson, 443 U.S. at 323-24.[7]

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[7] The brief amicus curiae of the Criminal Justice Legal Foundation in support of the petition for writ of certiorari seems implicitly to concede that the court below properly applied the standard of Jackson v. Virginia in this case. Brief Amicus Curiae at 3-4, 12. This amicus, however, urges the Court to grant certiorari in order to alter Jackson and require deferential review of sufficiency findings by state courts. Id. at 12. Because the Petitioner has not advanced this argument, and the courts below never addressed it, such a request is

2. The decision below did not disturb the jury's findings regarding West's testimony.

Petitioner claims that the decision below requires this Court's review because the lower court allegedly went beyond the Jackson analysis and impermissibly overturned the jury's conclusions concerning West's testimony, "substitut[ing] its own assessment of West's credibility for the jury's." Pet. 18. Petitioner's claim is premised on its belief that, where the common law inference of theft is involved, the "jury's resolution of the case necessarily will turn on whether the defendant explains his possession, or if an explanation is made, whether that explanation is credible." Id. In other words, the defendant's explanation is a "determinative factor." Id.

The problem with Petitioner's analysis is the failure to distinguish between the factual issue of whether a defendant's possession is satisfactorily explained and the sufficiency question of whether unexplained possession, alone or in combination with other evidence, proves guilt. A jury's determination that the defendant's possession of goods is unexplained is a credibility determination to which the habeas court must defer as part of its obligation to view the evidence in the prosecution's favor. Pet. App. 13 (quoting Jackson, 443 U.S. at 319). The court below did, in fact, defer to that credibility determination, as evidenced by its treatment of the

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inappropriate here. See United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 n.2 (1981); Bell v. Wolfish, 441 U.S. 520, 532 n.13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1960).

case as one involving unexplained possession of recently stolen property, to which the common law inference applies. To the extent the court analyzed West's explanation at all, it simply inquired--out of respect for the Commonwealth's right to have the evidence viewed in its favor--as to whether there was any incriminating evidence to be found in West's testimony.[8] It concluded that West's explanation was not so incredible or inherently implausible as to amount, in itself, to evidence of guilt. Pet. App. 19.

What the court below did overturn was the jury's conclusion that West's unexplained possession of the goods proved his guilt of theft beyond a reasonable doubt. That conclusion, of course, was not a credibility determination to which the court was obliged to defer; rather, it was a sufficiency determination which is subject to review under the constitutional standard of Jackson v. Virginia.

3. The decision below is a fact-bound determination which has no broader implications that require plenary consideration by this Court.

Petitioner's effort to imbue the decision below with broad implications of national import is predicated on the contention that the common law inference presuming one in the unexplained

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[8] As the court recognized, if a defendant's testimony is wholly incredible on its face, it may serve as positive evidence of guilt. Pet. App. 19 n.8 (noting distinction between present case and United States v. Eley, 723 F.2d 1522, 1525 (11th Cir. 1984), a case in which a defendant's incredible story of a phantom man giving him $50.00 to haul an eighteen-wheel trailer loaded with electric ranges to another city was found to be so facially implausible as to constitute positive evidence of guilt).

possession of recently stolen goods to be the thief was somehow "eviscerated" by the fact-bound ruling below. This contention is simply wrong.

It may be true, as Petitioner asserts, that the permissive inference of theft from the unexplained possession of recently stolen property enjoys widespread acceptance outside Virginia--though the petition fails to document this point in any meaningful way.[9] Such acceptance, however, even assuming it exists, is irrelevant to the due process issue presented when the facts giving rise to the inference serve as the only evidence of guilt. This narrow, case-specific issue was the only issue resolved below. Whether, with different evidence, the bare facts of the inference would suffice to uphold any other conviction remains an open question. Pet. App. 21 ("[W]e hold only that the specific evidence used to invoke the inference of guilt here failed to meet the beyond-a-reasonable-doubt test of Jackson v. Virginia." (footnote omitted)). Had West been found in possession of all the stolen items within one week of the theft, for instance, or had the items been of another sort, the result might well have been different.

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[9] As a substitute for "an exhaustive survey of the states," Petitioner cites an annotation entitled What Constitutes "Recently" Stolen Property Within Rule Inferring Guilt from Unexplained Possession of Such Property, 89 A.L.R.3d 1202 (1979), as authority for its contention that the inference still retains "widespread acceptance throughout the Nation." Pet. 14 n.4. Because the annotation intermingles two very different inferences arising from the possession of recently stolen property--the inference of actual theft and the inference of guilty knowledge--it is impossible to determine the degree to which its citations support Petitioner's assertion.

Thus, there is nothing in the decision below which "eviscerates" the inference or threatens to unsettle deep-rooted principles of law. The ruling below is a case-specific determination which would not warrant further review, even if it were incorrect. We note in passing, however, that the ruling below is not just correct but fully consistent with the great weight of authority across the country holding that the use of the inference from the unexplained possession of stolen goods, when standing alone, to prove guilt beyond a reasonable doubt is not only subject to review on a case-by-case basis but may also be questionable in all circumstances. See, e.g., Swift v. Lynn, 870 F.2d 1039, 1041 (5th Cir. 1989) ("[h]ad the state's case [of burglary] rested solely on the fact that the defendant possessed stolen property, the defendant's insufficiency of the evidence claim would be valid"); Cosby v. Jones, 682 F.2d 1373, 1381 (11th Cir. 1982) ("We have found no case in ... Supreme Court jurisprudence, or elsewhere, sustaining the sufficiency of the evidence to convict for actual commission of theft, burglary or robbery where the prosecution's case rested on the bare inference of guilt from possession."); United States v. Bamberger, 456 F.2d 1119, 1134 (3rd Cir. 1972) (dicta) ("the inference of guilt is justified only in the presence of factors which suggest the probability that the person could not have obtained possession in any way other than by theft"), cert. denied, 413 U.S. 919 (1973); United States v. Jones, 418 F.2d 818, 822-24 (8th Cir. 1969) (reversing armed robbery conviction based solely on the inference

of theft by reason of proof of defendant's recent possession of stolen goods, noting that "[m]ost modern authorities ... either hold[] ... or imply[] ... that the inference from recent possession of stolen property must in some way be corroborated by other circumstantial factors ... to sustain a finding of sufficiency of evidence"); Torres v. United States, 270 F.2d 252, 258-59 (9th Cir. 1959) ("mere possession of [recently stolen] goods is not enough," as a matter of law, to sustain conviction of unlawful possession; rather, "whether the possession plus additional circumstances is sufficient to show [guilt] is a matter which must be considered on a case to case basis" (emphasis added)), cert. denied, 362 U.S. 921 (1960); Barfield v. United States, 229 F.2d 936, 942 n.1 (5th Cir. 1956) (Brown, J., specially concurring) ("Many cases reason that possession of recently stolen property gives rise to a presumption that the possessor (1) knew it was stolen, and (2) was the thief. In my view the total circumstances must furnish a legitimate basis for such an inference, and where not plausible in the setting of a particular record, the rule of law cannot supply the needed proof." (citations omitted)); Berryman v. Moore, 619 F. Supp. 853, 859 (E.D. Va. 1985) ("It cannot be said then that petitioner's possession [of the stolen goods] more than a month after the theft, standing alone, could constitute proof beyond a reasonable doubt that he committed the break-in."), appeal dismissed, 792 F.2d 139 (4th Cir. 1986); State v. Heath, 492 P.2d 978, 979 (Utah 1972) ("The mere possession of stolen property

unexplained by the [possessor] is not in and of itself sufficient to justify a conviction of larceny.... In addition ... there must be proof of corroborating circumstances tending of themselves to show guilt.").

4. The decision below does not implicate Teague v. Lane because it was "compelled" by precedent and it imposes no "new" obligation on the Commonwealth of Virginia.

Petitioner claims that review is appropriate in this case because the decision below announced and retroactively applied a "new rule" on habeas review in violation of Teague v. Lane, 489 U.S. 288. This contention is premised on a misreading of the Court's retroactivity decisions and of the ruling below.

In Teague, the Court outlined the definition of a "new rule":

> [A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Id. at 301 (citations omitted).

Petitioner urges that the purpose of Teague is to proscribe "second-guessing" of state court decisions by federal courts. Pet. 10. However, Teague does not so crudely diminish the responsibility of the federal habeas court. It only prohibits the retroactive application of law on habeas review.

This Court has subsequently held that a habeas court may only grant relief if the state court's decision violated federal law already in place at the time the case was being litigated before the state courts. The habeas decision must be "compelled"

by precedent known to the state courts, Saffles v. Parks, 110 S. Ct. 1257, 1260-61 (1990), not merely within the "logical compass" or "controlled" by precedent. Butler v. McKeller, 110 S. Ct. 1212, 1217 (1990). The purpose served by requiring the standard to be "compelled" rather than "controlled" is to ensure that "gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990). "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Butler, 110 S. Ct. at 1217.[10]

Viewed in this context, the decision below did not announce a "new rule."[11] As discussed, precedent existing at the time

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[10] Petitioner, citing the language of Butler, contends that federal courts may not accept any claims raised by a habeas petitioner, if the outcome is "susceptible to debate among reasonable minds." Pet. 9-10. However, Butler insulates good-faith interpretations of precedents from review, not close decisions applying that precedent. A federal court is not constrained by retroactivity principles simply because ruling in favor of a habeas petitioner will overturn the earlier decisions reached by lower courts. Such a rule would foreclose the grant of habeas relief in virtually every case presented to the federal courts, unless the identical issue, based on identical facts, had been decided before the state decision became final. As the court below noted, "[o]bviously, a federal habeas court cannot be said to apply a 'new constitutional rule' whenever it applies the Jackson v. Virginia test to a 'new' set of facts in evidence." Pet. App. 10.

[11] Petitioner asserts that the lower court's reliance on Cosby v. Jones, 682 F.2d. 1373 (11th Cir. 1982), is a retroactive application of a "new rule." Pet. 10. This argument is premised on the assumption that Cosby itself announces a "new rule." Pet. 10, 17. However, Cosby, like the decision below, was compelled by Jackson and Ulster. Cosby, 682 F.2d. at 1383 ("[T]he Court's

this case was litigated had firmly established the need for sufficiency review by a habeas court both generally, Jackson, 443 U.S. 307, and more specifically, in cases where a statutory or common law inference is the only evidence of guilt, Ulster, 442 U.S. 140. See discussion ante pp. 7-10. Nor does the decision below impose a new obligation on the Commonwealth of Virginia. Because the court below carefully limited its holding to the facts of this case and did not address the validity of the inference per se, its holding does not restrict the use of Virginia's inference in future cases.[12] See discussion ante pp. 14-15.

Perhaps the best indication that the decision below did not announce a "new rule" in Virginia is a recent decision from the Virginia Court of Appeals, Morton v. Commonwealth, 408 S.E.2d 583 (1991). That court overturned a conviction because the evidence

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Ulster case clarifies that if the reviewing court can only say that the ultimate fact is more likely than not, then the Jackson v. Virginia standard has not been met."). Cosby no more announces a "new rule" than does the decision below. The fact that the Fourth Circuit found the Eleventh Circuit's non-binding analysis persuasive neither adds nor detracts from the Teague analysis.

[12] Petitioner also asserts that the court below decided a claim not exhausted in the state court proceedings. Pet. 13. Like Petitioner's Teague claim, this contention "rests on the erroneous premise that it [West's constitutional claim] involved a constitutional challenge to the facial validity of the permissive inference." Pet. App. 8-9. There is no facial challenge to the inference raised in this case, and the claim that was considered by the court below had been properly exhausted. Respondent raised a sufficiency claim in state and district court proceedings, and even the Commonwealth acknowledged that the district court was required to conduct a Jackson review on the merits. J.A. 29a-30a.

which gave rise to a permissive inference of an intent to distribute drugs was not sufficient, standing alone, to prove guilt beyond a reasonable doubt. Tellingly, the court looked to Ulster and the decision below for the proposition that a permissive inference does not necessarily prove guilt beyond a reasonable doubt in a given case:

> [E]ven if the inference is permissive, if the only evidence of guilt is that which gives rise to the inference, a rational relationship must exist, beyond a reasonable doubt, between the inference and the proved fact.

Id. at 585 (citing Ulster and West). It is apparent from this decision that the Virginia Court of Appeals does not share the Petitioner's concerns about the ruling below.

5. The Petition fails to identify any compelling reason for granting certiorari.

Supreme Court Rule 10(a) sets forth the situations in which the Court has traditionally found compelling grounds for granting certiorari to review a decision of a United States court of appeals:

> When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Sup. Ct. R. 10(a) (1990). None of these situations is presented here.

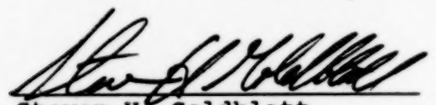
Petitioner has not identified any conflict between the decision below and the decision of any other United States court

of appeals on the same matter. Moreover, Virginia courts themselves appear to conduct the same type of review as that used below. See Morton v. Commonwealth, 408 S.E.2d 583, 585-86 (Va. Ct. App. 1991) (if only evidence of guilt is that giving rise to permissive inference, it must meet the "beyond a reasonable doubt" standard; holding, in case at bar, that rational juror could not have found defendant guilty beyond a reasonable doubt of intent to distribute cocaine based on nothing more than the bare facts giving rise to the permissive inference of intent). Nor does the fact that the Virginia Supreme Court reached a different result in this particular case represent a conflict which calls for the Court's intervention. This Court recognized in Jackson v. Virginia that juries will occasionally convict on the basis of constitutionally insufficient evidence, 443 U.S. at 317, and the federal habeas corpus statute, 28 U.S.C. § 2254, exists so that federal courts can redress such constitutional error when it goes unredressed in state courts. Id. at 323. A fact-bound dispute over the sufficiency of the evidence in a single case--notable only for its dearth of incriminating evidence--is simply not worthy of this Court's review. As Justice Stevens has noted: "[I]t would not be an appropriate use of this Court's scarce resources to grant certiorari and review every record in which a federal court makes a conscientious effort to apply the dictates of Jackson v. Virginia." Anderson v. Fuller, 455 U.S. 1028, 1030 (Stevens, J., respecting denial of certiorari).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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